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**DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE
DRAFT PROTOCOL TO THE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
ON MATTERS SPECIFIC TO MINING, AGRICULTURAL
AND CONSTRUCTION EQUIPMENT (THE "MAC
PROTOCOL")**

Pretoria, 11-22 November 2019

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**SUMMARY REPORT
FOR 12 NOVEMBER 2019**

THIRD MEETING OF THE COMMISSION OF THE WHOLE

Item No. 8 on the Agenda: consideration of the draft Protocol (continued)

1. The Chair opened the meeting at 09:05 by summarising the first day's discussions.
2. The Chair invited an Observer serving as a Senior Advisor to UNIDROIT on Cape Town Convention-related matters, Secretary-General of the Aviation Working Group, and President of the UNIDROIT Foundation, to deliver a presentation on how the MAC Protocol could replicate the success of the Aircraft Protocol. The Observer noted the importance of clarity, simplicity, and certainty in the text of the Protocol, and encouraged delegations to work towards the adoption of a treaty which would maximise economic benefits for Contracting States. He also encouraged delegations to take into account the views of the MAC Working Group as the representative body of the private sector in the negotiations. He concluded by identifying several legal matters that required particular attention and suggested that delegations should carefully consider issues associated with the future MAC Protocol international registry.
3. The Chair moved to the consideration of the draft Protocol (DCME-MAC – Doc. 3), as adopted by the Second Meeting of the Committee of Governmental Experts (Rome, 2 – 6 October 2017), and authorised for transmission to the Diplomatic Conference at the 97th Session of the UNIDROIT Governing Council (Rome, 2 – 4 May 2018). He suggested that the Commission undertake an article by article consideration of the draft Protocol. He further suggested that the Commission return to the preambulatory clauses at a later time. Noting no objection to the proposition, the Chair opened the floor for discussion on Article I.

Article I

4. The Reporter introduced Article I. He explained each of the definitions contained within Article I(2) and noted that they must be read in conjunction with the definitions in Article 1 of the Cape Town Convention.

5. Upon proposals from several delegations, the Commission agreed to postpone the discussion on definitions (c), (h), and (j) until the relevant Articles to which they related would be discussed.

6. A delegation recommended the addition of the following sentence after “Coding System” in Article I(2)(g): “, as amended by the Protocol of Amendment to the International Convention on the Harmonized Commodity and Coding System of 24 June 1986”. Several delegations expressed their support for the proposal and the matter was referred to the Drafting Committee.

7. *Article I(1), Article I(2), as well as parts (a), (b), (d), (e), (f), (i), (k), and (l) were adopted without modification.*

Article II

8. The Chair opened the floor for discussion on Article II.

9. The Reporter introduced the Article.

10. One delegation suggested that Article II(2) contained superfluous language in relation to the use of the defined term “equipment”. Another delegation concurred, noting that the same issue also arose in Article I(2)(d).

11. One delegation suggested that Article II(4) be moved to the end of the Article.

12. Another delegation noted the improper use of the word “the” rather than “this”, in Article II(3).

13. *Article II was approved with respect to policy, with the Drafting Committee invited to improve the language in order to make it more concise, with similar consideration to also be given to Article I(2)(d). The Chair noted that corresponding Articles of the other Protocols to the Cape Town Convention may be considered in achieving greater clarity in this regard.*

Annexes to the draft Protocol

14. Noting that Article II of the draft Protocol defined the scope of the treaty through reference to the Protocol’s Annexes, one delegation queried whether the Annexes to the draft Protocol should be discussed. The Chair agreed with this proposition, and invited the Secretariat to introduce the Annexes.

15. The Executive Secretary drew the Commission’s attention to DCME-MAC – Doc. 6. He explained that the document provided an analysis of the 42 Harmonized System (“HS”) codes which were presently listed in the draft Protocol’s Annexes, as well as the Secretariat’s recommendations regarding the 42 additional codes which were proposed by States in 2018 for addition to the draft Protocol Annexes. He also drew the Committee’s attention to DCME-MAC – Doc. 16, which explained the Secretariat’s preliminary recommendations in relation to additional HS code proposals made by States in their comments on the draft Protocol.

16. The Chair suggested that the Commission establish a Working Group to consider matters related to the HS codes listed in the draft Protocol Annexes. The Working Group would be asked to consider the HS codes presently in the Annexes, the recommendations within DCME-MAC – Doc. 6 and DCME-MAC – Doc. 16, as well as any additional HS codes which may be proposed during the Diplomatic Conference.

17. Several delegations which had submitted HS Codes for consideration as part of their comments introduced their proposals and noted their intention to join the HS Working Group. Another Delegation expressed its intention to join the Working Group in order to propose additional codes for inclusion within the draft Protocol Annexes.

18. One delegation noted that the HS codes proposed in their comments on the draft Protocol were a result of input received from their domestic mining, agricultural and construction industries. Another delegation noted that one of the HS codes proposed by another States in its comments on the draft Protocol explicitly covered parts, and suggested that HS codes covering parts were unsuitable for inclusion in the draft Protocol Annexes. It was noted that the issue be discussed further in the HS Working Group.

19. *The Commission of the Whole established a Working Group to consider matters related to HS codes and the draft MAC Protocol Annexes (the "HS Working Group") and invited all delegations to join the Working Group.*

Article XXXIII

20. The Chair noted that Articles II and XXXIII of the draft Protocol both dealt with the relationship between the MAC Protocol and the HS and suggested it would be prudent for the Commission to consider the two Articles together. He invited the Secretariat to introduce the matter.

21. The Executive Secretary introduced Article XXXIII, noting that the Secretariat had conducted intersessional work and consultations on this matter following a request by the Committee of Governmental Experts to prepare a comparative legal analysis of different amendment mechanisms in various multilateral treaties. He noted that the Secretariat's analysis was available in DCME-MAC – Doc. 5 corr. He explained that, in compliance with the Committee of Governmental Expert's request, the Secretariat had prepared an alternative draft of Article XXXIII which reflected established treaty practice. It was noted that the Secretariat draft proposed splitting Article XXXIII into two articles, using a dual amendment mechanism to cater to different types of amendments.

22. The Chair noted that the policy discussion on Article XXXIII would take place in the Final Clauses Committee.

23. Several delegations noted that they had provided formal comments on Article XXXIII. One delegation noted the importance of ensuring that a sufficient amount of time was provided to States to make legislative changes implementing amendments to the MAC Protocol. The delegation noted that this could either be accomplished by allowing for a longer period of time for Contracting States to implement amendments, or by allowing Contracting States to temporarily extend their implementation periods. Another delegation noted that it was important for Contracting States to be able to control any changes to their obligations under the MAC Protocol.

24. *The Chair closed the discussion on Article XXXIII and suggested that the Final Clauses Committee convene as soon as possible to further discuss the matter.*

Article III, IV, and V

25. Articles III on Derogation, Article IV on Representative Capacities, and Article V on Identification of Equipment were adopted without modification.

26. With regard to Article V, a delegation sought to confirm that more than one of the four methods of identifying equipment listed in Article V(1) could be present in a written agreement constituting an international interest. The Commission agreed that the delegation's understanding of Article V was correct.

Article VI

27. Article VI on Choice of Law was adopted without modification.

28. Several delegations and an observer from a regional economic integration organisation sought to confirm their common understanding that the reference to “domestic law” in Article VI(3) did not include a reference to the private international law provisions of the law chosen by the parties. The Commission agreed that this common understanding was correct, and that the matter should be explicitly dealt with in the Official Commentary, while not modifying the text of Article VI to avoid negative inferences with respect to the corresponding provisions present in the other Protocols. One delegation confirmed that the matter was dealt with in the Official Commentary to the Aircraft Protocol at Paragraph 539, and that the same language could be retained for the MAC Protocol Official Commentary.

Article VII

29. The Chair introduced the Article, noting that the relationship between international interests in MAC equipment and interests in immovable property remained one of the Protocol’s most challenging issues. He explained that Article VII had been negotiated over a number of years and then opened the floor for general comments.

30. One delegation noted that the MAC Protocol would be the first Protocol within the Cape Town Convention system to cover equipment that could become associated with immovable property. The delegation explained that immovable property was the subject of national law regimes and that it was important for the treaty to strike a balance between preserving the priority of international interests and respecting national law.

31. An observer from the MAC Working Group noted the importance of the Protocol providing clarity and certainty to ensure it delivered the greatest economic benefits for the mining, agricultural and construction sectors. He highlighted that Article VII Alternatives B and Alternatives C relied upon national law regimes, and thus would not facilitate the same risk reductions for creditors as Alternative A. He noted that Contracting States that applied Alternatives B and C would not experience significant economic benefits in ratifying the Protocol and suggested that the Commission should consider their deletion.

32. A delegation noted that the definition of “immovable-associated equipment” in Article I(2)(h) did not cover the full extent of cases which it was intended to cover. It was explained that the term “interest in immovable property” in the definition should be read to also extend to “rights over the immovable property”. The delegation noted, while not recommending a change to the text, that the definition should be understood to also cover situations where under the law of the State in which the equipment was situated, the holder of rights over immovable property gained a right or interest over equipment associated with the immovable property.

33. The Chair opened the floor for consideration of Article VII(1) and (2).

34. A delegation noted that the necessity of Paragraph 1 had been questioned on several occasions, on the basis that it provided a rule that existed under almost all domestic law systems. The delegation noted that Paragraph 1 applied to a scenario where a court in a Contracting State made a decision in relation to the priority of an international interest in equipment associated with immovable property located in a non-Contracting State. It was explained that such an occurrence would be rare, because the court would be making an extra-territorial ruling. The delegation suggested that Paragraph 1 should be retained however the Official Commentary should clarify that it would only be rarely applicable.

35. Another delegation noted that under European Union regional rules it was possible for a domestic court in a European Union Member State to make a decision in relation to equipment located in another European Union Member State. The delegation suggested that Paragraph 1 be retained to deal with such circumstances.

36. *The Commission adopted Paragraphs 1 and 2 without modification and suggested that the Official Commentary explain the issue raised by delegations in relation to Paragraph 1, without reference to the term "extra-territorial jurisdiction".*

Alternative A

37. The Chair opened the floor for comments on Alternative A of Article VII.

38. The Executive Secretary noted that the Committee of Governmental Experts at its second meeting in 2017 had mandated the Secretariat to formulate a limitation to Alternative A in circumstances where the physical removal of the equipment would cause significant damage. The Secretariat's proposal in this regard could be found in Part 3 (i) of DCME-MAC – Doc. 5 corr. The Executive Secretary explained that the Secretariat's proposal established a factual test based on whether the value of the equipment after removal would exceed both the costs of removing it and making necessary repairs to the immovable property. In circumstances where the residual value of the equipment would not exceed the cost of removal and repairs, the international interest in the equipment should not have priority over interests in the equipment arising out of its association with immovable property.

39. Several delegations expressed support for the policy underpinning the Secretariat's proposal, subject to improvements in drafting. One delegation noted that it had provided an alternative drafting proposal in its comments on the draft MAC Protocol. The matter was referred to the Drafting Committee.

40. One delegation noted that the drafting of Alternative A suggested that an international interest in immovable-associated equipment had to be created prior to the association of the equipment to the immovable property for Alternative A to apply. The delegation noted its understanding that Article VII intended to provide a legal framework for the treatment of international interests in immovable-associated equipment, whether the equipment became associated with immovable property before or after the creation of the international interest in the equipment.

41. The Commission discussed whether Article VII should apply to both situations in which (i) international interests were created in equipment before the equipment became associated with property, and (ii) where international interests were created in equipment after the equipment became associated with property. Several delegations noted the importance of Article VII providing a complete legal framework on the matter.

42. *The Commission agreed that, in principle, Article VII should provide a framework of rules regulating the treatment of immovable-associated equipment, where an international interest was created in the equipment either before or after its association with immovable property. The matter was referred to the Drafting Committee.*

43. The Chair adjourned the meeting at 12:30.

FOURTH MEETING OF THE COMMISSION OF THE WHOLE

Item No. 8 on the Agenda: consideration of the draft Protocol (continued)

44. The Chair opened the meeting at 14:05.

45. One delegation proposed that Alternative A include a rebuttable presumption that, if the Protocol applied to equipment at the time an international interest is created, the Protocol would continue to apply at a later time. The delegation suggested that the proposed approach would provide certainty to the creditor and facilitate the extension of credit secured by equipment associated with immovable property. Several delegations supported the policy underpinning the proposal, but noted their concern that it could add further complexity to Article VII. It was suggested that the matter be referred to the Drafting Committee before it was discussed further by the Commission.

46. *The Commission referred the matter the Drafting Committee with instructions to prepare an initial draft of the proposed rule.*

47. An observer from the MAC Working Group reiterated that Alternatives B and C did not appeal to financiers, and would undermine the economic benefits offered by the MAC Protocol. Several delegations disagreed with the assertion. One delegation noted that Alternative B was not equivalent to the application of national law to priority rules over equipment associated with immovable property, but rather, only applied national law in specific cases where the legal identity of the equipment ceased to exist or where the international interest was (i) registered after the immovable property law interest and (ii) the equipment became associated with the immovable property prior to registration of the international interest. The delegation emphasised that it was important to retain Alternative B in order to protect the interests of land financiers, and banks, who were major stakeholders in many countries which supported the MAC Protocol.

48. *The Chair noted that there was not sufficient support to delete Alternatives B and C from the draft Protocol.*

49. The Chair adjourned the meeting at 15:15.

THIRD MEETING OF THE PLENUM

Item No. 4 on the Agenda: election by the Conference of the President and the Vice-Presidents of the Conference.

50. Following consultations, the Conference elected the five Vice-Presidents of the Conference as follows: Mr. Jun Ye (People's Republic of China), M. Pierre Oba (Republic of Congo), Mr. Marvin Yuen (Germany), H.E. Ms Ana Luisa Fajer (Mexico), and H.E. Mr Cèsar Eneas Rodríguez Zavalla (Uruguay).

Item No. 5 on the Agenda: establishment by the Conference of the Credentials Committee, the Commission of the Whole, the Final Clauses Committee, the Drafting Committee and other Committees as necessary.

51. The President noted that all States interested in participating in the Final Clauses Committee were invited to attend its first meeting. The Chair(s) of the Final Clauses Committee would be elected by the Committee during its first meeting.

52. The President noted that the Drafting Committee would be composed of delegates from Australia, Canada, France, Germany, Japan, Mexico, South Africa, Spain, the United Kingdom, and the United States of America. She noted that the Drafting Committee should be limited in its

membership to ensure efficiency and effectiveness. She added that the Drafting Committee would also elect its own Chairs at its first meeting.

Item No. 7 on the Agenda: examination by the Conference of the Report of the Credentials Committee

53. The President invited the Chair of the Credentials Committee, a representative of Ivory Coast, to present an interim report of the Credentials Committee.

54. The Chair of the Credentials Committee presented an interim report to the Plenum, noting that as of 11 November at 17:30, 39 States, one regional economic integration organisation, two intergovernmental organisations, and four international non-governmental organisations had attended the Conference. Of the 39 State in attendance, formal credentials had been submitted by 22 States, one regional economic integration organisation, one intergovernmental organisation and four international non-governmental organisations. Additionally, five States had presented full powers to sign the international legal instrument to be adopted by the Conference.

55. The President thanked the Chair of the Credentials Committee, and the Conference endorsed the recommendation of the Committee that, in conformity with Rule 4 of the Rules of Procedure, all delegations registered be permitted to participate in the Conference pending receipt of their credentials in due and proper form. The Conference also encouraged States which had not yet presented their letters of credentials in proper form to do so as soon as possible.

56. The President adjourned the meeting at 15:30.